CPR CENTER FOR PROGRESSIVE REFORM

November 3, 2010

The Honorable Lisa P. Jackson

Governor Jack Markell
Mayor Adrian Fenty
Governor Martin O'Malley
Governor David Paterson
Governor Ed Rendell
Governor Bob McDonnell
Governor Joe Manchin

Dear Administrator Jackson, Mayor Fenty, and Governors Markell, O'Malley, Paterson, Rendell, McDonnell, and Manchin:

The Center for Progressive Reform (CPR) is a 501(c)(3) nonprofit research and educational organization with a network of Member Scholars working to protect human health and safety and the environment through analysis and commentary. We write to you today in response to the draft Phase I Watershed Implementation Plans (WIPs) that the District of Columbia, Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia (collectively, "Bay jurisdictions") submitted to the Environmental Protection Agency on September 24, 2010. While the Bay TMDL establishes a destination, the WIPs provide the key roadmap for arriving at that destination. Without strong WIPs, the momentum for restoring the Chesapeake Bay will be stymied and the Bay will continue to languish.

The establishment of the Bay TMDL marks a tremendous turning point in restoring the Chesapeake Bay by capping the total amount of discharged pollutants. To ensure that state allocations and the overall Bay TMDL are met, EPA has established a new accountability framework that represents the first real opportunity to hold the Bay jurisdictions accountable for their promises to reduce pollution and clean up the Bay. States will play a key role in achieving the Bay TMDL, and states that fail to contribute or fail to provide an equally powerful alternative are undermining the overall goals that several generations of governors have endorsed.

The new framework includes a three-phase series of Watershed Implementation Plans (WIPs), in which states disclose what new and existing authorities will be needed and used to achieve the pollutant reductions needed to meet the Bay TMDL. The WIPs will also detail how states will meet their two-year milestones, which ensure short-term accountability for meeting the Bay TMDL. In letters and guidance documents, EPA detailed its expectations and elements for the Phase I WIPs, including thorough baseline capacity reviews and gap analyses. The WIPs are a tremendous opportunity for states to detail a roadmap to restoring the Bay and to establish public confidence and accountability for following through with their commitments.

CPR has developed a set of metrics to evaluate each state's final Phase I WIP when it is published on November 29, 2010. The metrics will be used to assign letter

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grades that evaluate (1) the transparency of information in the WIPs in providing key information about mandatory and voluntary pollutant control programs and (2) the strength of these programs in making actual pollutant reductions. The metrics focus on major sectors under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program and other elements identified by EPA in guidance documents and letters.[1] During the week of August 16, 2010, CPR sent a copy of these metrics to each of the Bay jurisdictions' leaders and the heads of relevant agencies. Please see the attached list for all the recipients of this correspondence. CPR only received responses from Maryland and West Virginia. A copy of the metrics is attached to these comments.

The comments below first describe the significance of each sector and then address each Bay jurisdiction's submission. We are happy to discuss these comments with you or your staff. Thank you for your leadership and commitment to restore the Bay.

Sincerely,

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Attachments: List of State Agency Heads for CPR Metrics
Ensuring Accountability in Chesapeake Bay Restoration: Metrics for the Phase I Watershed Implementation Plans
Failing the Bay: Clean Water Act Enforcement in Maryland Falling Short

[1] U.S. Environmental Protection Agency, "A Guide for EPA's Evaluation of Phase I Watershed Implementation Plans" (April 2, 2010) [hereinafter Phase I Guide], *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/GuideforEPAWIPEvaluation4-2-10.pdf, and Letter from William C. Early, Acting Regional Administrator, EPA Region 3, to L. Preston Bryant, Jr., Virginia Secretary of Natural Resources (Nov. 4, 2009) [hereinafter Expectations Letter], *available at* http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/tmdl_implementation_letter_110409.pdf.

Sectors for Phase I WIP Evaluation

Overall Evaluation & Recommendations

Overall, the Bay jurisdictions' draft Phase I WIPs do not provide an adequately clear or defined roadmap to achieving the Bay TMDL. The draft WIPs tend to list with varying degrees of specificity the state programs related to achieving the Bay TMDL without explicitly committing to strengthening existing programs or implementing new actions to make actual pollutant reductions. The extent to which states disclosed information for the transparency of information evaluation necessarily determines the ability to evaluate the strength of the programs. In the final Phase I WIPs, all Bay jurisdictions must provide the specific numbers and amounts of resources available and needed to form a baseline of information against which future progress can be compared. All Bay jurisdictions must make specific commitments, demonstrated by establishing timelines and milestones, to improve existing programs or implement new programs to achieve the allocations under the Bay TMDL. The Phase I WIPs should amount to more than an inventory of state programs; they should constitute a defined roadmap to which EPA and the public can hold the Bay jurisdictions accountable.

National Pollutant Discharge Elimination System Permitting

The linchpin of the Clean Water Act is the National Pollutant Discharge Elimination System (NPDES) permitting program, which places enforceable pollutant discharge limits on all point sources. All point sources must obtain a permit before they discharge any pollutant into a state's waters. The primary categories of point source dischargers that discharge nitrogen, phosphorus, or sediment into the Bay watershed include wastewater treatment facilities, urban and suburban areas, and concentrated animal feeding operations. Because these dischargers must all comply with their permits, a strong and up-to-date NPDES permit program is the guaranteed means of reducing pollutant discharges.

When a permit expires, the facility is not shut down but rather continues to operate indefinitely under its expired permit, which does not incorporate new standards or regulations passed in the interim. A significant number of expired permits indicates that a state lacks the capacity to administer an effective permitting program, a crucial deficiency given the need to rewrite all permits in a timely fashion to meet TMDL allocations. Permits are typically written for a five-year term. Expiring NPDES permits must be renewed promptly, in compliance with any applicable TMDL. For the Bay TMDL, all NPDES permits should incorporate the wasteload allocations by no later than December 30, 2015.[2]

The final Phase I WIP should establish not only on implementation milestones and targets but also institutional milestones to establish programs that better regulate and monitor pollutant discharges. For example, progress on implementation milestones may be measured by counting the number of facilities that undergo necessary upgrades. Institutional milestones, however, focus on the state agency's progress in updating and reissuing permits, targeting enforcement actions, or acquiring new funding to fill existing gaps. Adopting both types of milestones will ensure achievement of the Bay TMDL.

Enforcement of NPDES Permits

A strong, deterrence-based enforcement program is the most effective way to ensure compliance with NPDES requirements. Deterrence-based enforcement is based on the theory that regulated entities will comply with the law where compliance costs less than violating the law. Thus, penalties for

[2] This date assumes that EPA finalizes the Bay TMDL on or before December 31, 2010. Assuming that the last new or reissued permit issued before the Bay TMDL goes into effect is December 30, 2010, and expires on December 30, 2015, this permit would need to be updated or reissued in accordance with the TMDL on or before the expiration date. All currently expired permits, if reissued after the Bay TMDL is in effect, must include the applicable Bay TMDL allocation.

noncompliance must be severe enough to motivate compliance. Deterrence-based enforcement is characterized by four essential elements: (1) sufficient, consistent, and regular compliance monitoring to identify violators; (2) timely initiation of enforcement actions against violators; (3) a mandate that the violator come into compliance with applicable laws and regulations; and (4) imposition of penalties that, at a minimum, eliminate any economic benefit that the violator gained from violating the law and that provide a deterrent for future violations.

Because the NPDES permitting program has been the key to reducing pollution from point sources, ensuring compliance through effective enforcement is crucial. The Phase I WIPs should provide detailed information regarding a state's enforcement program in order to allow the public to understand and assess the effectiveness of the program.

One possible venue for annual public disclosure is for the all Bay jurisdictions to pass legislation requiring an annual report of enforcement activities, such as section 1-301(d) of the Maryland Environment Code.[3] This section requires the Maryland Department of Environment (MDE) to publicly disclose information, including:

- The number of permits issued and in effect for the preceding year;
- Information on the total number of inspections, audits, or spot checks performed at facilities with permits;
- Information on the total number of injunctions, corrective actions, and stop work orders issued;
- The total amount of money collected as a result of administrative and civil penalties; and
- The number of criminal actions charged, convictions obtained, and fines received.

MDE also discloses the annual budget for each program and the level of staffing. By publishing this information each year, the public can track the effectiveness of MDE's NPDES permitting program and encourage improvements in its enforcement programs. If other states had legislation requiring similar annual disclosure, states may be further encouraged to improve their enforcement programs by comparison and political pressure.

Monitoring and Verifying Voluntary Practices by Nonpoint Sources

While nonpoint sources are not subject to mandatory pollutant controls under the Clean Water Act, they are assigned load allocations under the Bay TMDL. Achieving these load allocations depends largely on voluntary practices and federal, state, and private incentive programs that subsidize farmers for implementing best management practices (BMPs) to control nutrient runoff, for example. In the WIPs, EPA and all Bay states must commit to making every effort to regularly monitor and verify that nonpoint sources that have received public funding for implementing BMPs or other pollutant controls do in fact have these practices in place, maintained, and functioning. For example, federal grant programs in section 319(h) of the CWA and in USDA's primary conservation funding programs (Environmental Quality Incentives Program, Conservation Reserve Program, and Wetlands Reserve Program) provide funding for implementation of these practices. Thus, monitoring and verifying these practices is important not only for achieving substantive reductions in pollutants from nonpoint sources but also for maintaining accountability for spending public funds.

Contingencies

Contingencies are a crucial part of the Phase I WIPs because they provide a concrete, alternative plan for how states will achieve their TMDL allocations if the primary pollutant controls are not

[3] MD Envir. Code § 1-301(d).

implemented or fail to achieve the required reductions. Identifying contingencies requires states to undergo careful planning by identifying the full arsenal of potential tools that can be used to achieve reductions. Committing to implementing strong contingencies also provides assurance that, either through primary controls or the secondary contingent controls, the Bay TMDL and states' allocations will be achieved.

Per EPA guidance, states need to implement contingencies if delays in the adoption of new or revised legislation or regulations occur; if participation rates in voluntary programs fall below projections; or if compliance rates with regulatory programs are not achieved. States should also consider changes in land use, development rates, and voluntary participation rates.

Concentrated Animal Feeding Operations

Concentrated animal feeding operations (CAFOs) dot the entire Chesapeake Bay Watershed, with a high concentration of poultry operations on the Delmarva Peninsula. In 2008, Maryland poultry operations generated approximately 650 million pounds of chicken manure.[4] That same year, new federal CAFO regulations went into effect. Among the changes included a requirement that CAFOs submit nutrient management plans (NMPs) as part of the NPDES permit applications. The regulations require state authorities must then review the NMPs and provide the opportunity for public comment and review. State authorities are required to include the terms of the NMP as enforceable elements of the NPDES permits. In general, states are required to update their CAFO permitting programs to be consistent with the federal regulations within one year of the effective date or, if a state statutory change is required, within two years.

Thus, by the end of 2010, all Bay states should have CAFO programs that are consistent with the 2008 federal regulations. More importantly, Bay states must ensure that all facilities that qualify as CAFOs receive permits that are consistent with both the updated federal regulations and the Bay TMDL. States should determine the status of the animal feeding operations in their state and issue CAFO permits where required.

Stormwater

According to the Chesapeake Bay Program, stormwater runoff from urban and suburban areas contributes 17 percent of the phosphorus, 11 percent of the nitrogen, and 9 percent of the sediment loads to the bay. That stormwater also contains a variety of chemical contaminants from roadways and parking lots. As it courses from impervious surfaces and rushes into natural waterways, stormwater can erode and damage aquatic habitat and vegetation. Because rural and agricultural lands in the Bay are increasingly urbanized and converted into impervious surfaces, stormwater is the only expanding source of pollution in the watershed.

Under the Clean Water Act, stormwater is considered a point source and thus requires a NPDES permit. The stormwater permit covers operators of municipal separate storm sewer systems (MS4s) and construction and industrial stormwater. All Bay states have delegated authority to administer the stormwater permitting program, which is often in turn administered by local governments. Thus, information about how local governments administer this program is crucial to curbing pollutant discharges from stormwater.

[4] Ian Urbina, *In Maryland, Focus on Poultry Industry Pollution*, N.Y. TIMES (Nov. 29, 2008) at A14.

Air Deposition

Approximately one-third of the nitrogen in the Chesapeake Bay comes from atmospheric deposition through mobile, industrial, agricultural, and natural sources.[5] The boundaries of the Chesapeake Bay airshed extend far beyond the boundaries of the watershed; nevertheless more than half of the atmospheric deposition of nitrogen comes from Bay states. Thus, reducing air deposition will require coordinated efforts by Bay states and EPA under the Clean Air Act to ensure that emitters comply with their permits and to bring effective enforcement actions against those in violation of those permits.

[5] Chesapeake Bay Program, "Air Pollution," http://www.chesapeakebay.net/airpollution.aspx?menuitem=14693 (last visited Oct. 12, 2010).

Delaware

Overall

For the transparency of information evaluation, Delaware's draft WIP is well-organized and uses a consistent format for each sector that makes finding information easy. Delaware touches on each of the required elements but does not explicitly disclose all the information listed in EPA's guidance. For the strength of program evaluation, Delaware does not provide sufficient detail to verify its claims or provide assurance that its allocations will be achieved.

The draft WIP would lower sediment pollution to a level that is 20 percent below the target allocation. However, the draft WIP still permits nitrogen and phosphorous discharges to be 17 and 8 percent, respectively, more than the level allowed by the target allocation.[6]

In the final Phase I WIP, Delaware should provide more detailed information on its NPDES permitting, enforcement, and compliance programs and make stronger commitments to implementing pollutant control measures in all sectors to achieve the Bay TMDL.

NPDES Permitting

For nearly every sector, the draft WIP states that 100 percent of facilities subject to NPDES permits have those permits but does not provide the specific number of facilities. This information also does not reveal which of these facilities have up-to-date permits and which have expired or administratively continued permits. The draft WIP does not contain any schedules or commitments for updating expired permits, nor does it disclose when all permits will be made consistent with the Bay TMDL.

In the final WIP, Delaware should not only point to programmatic needs but also to personnel and financial gaps and provide a plan for filling those gaps. For example, the wastewater section notes that current staff levels are "insufficient to keep up with permit issuance demands" but does not specify what additional staff are needed and how the state may acquire funds for new staff.

Enforcement of NPDES Permits

The draft WIP contains some information regarding inspections but not enough to determine whether Delaware is operating an effective, deterrence-based enforcement program in each sector. For example, the WIP states that "all of the major and half of the minor permitted wastewater facilities are inspected/audited on an annual basis." The WIP also states that compliance and participation rates are 100 percent for wastewater treatment plants and "[n]o additional regulatory or enforcement authorities are needed to meet these rates." However, the WIP fails to provide information to substantiate these claims, which if true are remarkable. Without providing additional details regarding the number of onsite inspections versus paperwork audits or the inspection protocol, assessing the enforcement program is difficult.

In the final WIP, Delaware should include complete enforcement data, including: the number of physical, onsite inspections per sector; the number of violations and penalty actions and the amount of penalties assessed during the past year; a description of the enforcement activities by local governments with delegated authority; and a detailed picture of enforcement resources. Collectively this information would allow a better understanding of how Delaware's NPDES permit enforcement program functions.

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[6] U.S. E.P.A., "Summary of Delaware Draft Watershed Implementation Plan" (Sept. 22, 2010) (on file with Yee Huang) [hereinafter "EPA Summary of Delaware"].

Monitoring and Verifying Voluntary Practices by Nonpoint Sources

The draft WIP provides some information regarding specific procedures and resources for assuring participation by unregulated nonpoint sources in actions to reduce pollutant discharges. The draft WIP also lists programs and their past and future funding levels. Programs such as the Agricultural Management Assistance Program and the Wetland Reserve Program are largely voluntary and provide cost-share assistance. These programs have very limited resources: 0.2 and 3.5 technical and staff positions, respectively, and annual budgets of $60,000 and $215,000. Moreover, the overall list of voluntary programs does not identify gaps in resources or how these gaps may be filled.

In the final WIP, Delaware should provide greater detail about actual participation rates and the method to ensure that pollutant control practices are in place, maintained, and functional. Delaware should also identify specific programmatic gaps and how they will be filled.

Contingencies

Compared to other states' submissions, the Delaware draft WIP contains fairly detailed contingencies. For example, wastewater facilities may be required to upgrade to higher levels of nutrient removal, up to the best available technology. However, the weakness in these contingencies is the lack of commitment to implement them; the draft WIP does not specify a timeline or cite resources for implementing these contingencies.

In the final WIP, Delaware should establish a timeline for identifying failures of primary controls and implementing contingencies. For example, Delaware could commit to periodic checks of the primary controls that coincide with the two-year milestones.

Concentrated Animal Feeding Operations

According to the draft WIP, Delaware's CAFO program was updated in Fall 2010 to be consistent with the new federal regulations. However, the draft WIP did not indicate if and when the relevant CAFO permits will be issued or updated to be consistent with both the Bay TMDL and the updated regulations. Delaware should also provide more information regarding its CAFO compliance and enforcement program, including inspection frequency, compliance rates, and enforcement activities and penalties.

Stormwater

The draft WIP cites high permitting and inspection rates for portions of Delaware's stormwater program. However, the WIP fails to provide sufficient information to verify these rates, and EPA has expressed its skepticism of these rates.[7] The WIP does not disclose the extent of a local government's delegated authority to conduct inspections, which is important information because stormwater permits are often administered by local authorities.[8] The WIP identifies the need for more resources to administer an effective stormwater program but fails to specify quantified numbers or how Delaware will fill these needs.

In the final WIP, Delaware should provide more information to substantiate the high levels of permitting and should further specify needs to ensure that its stormwater program will meet the requirements of the Bay TMDL.

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[7] *Id.* In EPA's preliminary evaluation of Delaware's draft WIP, it "questions that 100 percent of construction sites are in compliance."

[8] Del. Code tit. 7, § 4001.

Air Deposition

Delaware's section on air does not discuss the state authorities available to control air emissions. However, the draft WIP states that there is "little left" in Delaware's regulatory arsenal to further reduce nitrogen pollution from regulated sources and that, even if more stringent controls were identified, Delaware would see little impact due to the location of sources and climatic patterns.[9] As a result, Delaware would like to see EPA tighten federal rules under the Clean Air Act to reduce the air pollutants that reach the state from surrounding states. Because Delaware does not disclose information about its state air program, its claim that there is "little left" is difficult to evaluate. In the final WIP, Delaware should disclose more information that would allow a better evaluation of its program.

[9] Delaware Chesapeake Interagency Workgroup, *Delaware's Phase I Chesapeake Bay Watershed Implementation Plan* 133 (September 1, 2010), *available at* http://www.wr.dnrec.delaware.gov/Information/WatershedInfo/Documents/Chesapeake%20Phase%201%20WIP/DE_DRAFT_Phase1_WIP_withAppendices_090110a.pdf.

District of Columbia

Overall

The District of Columbia is unique among Bay watershed jurisdictions because nearly all of its sources of pollutants are point sources and covered by National Pollutant Discharge Elimination System (NPDES) permits, administered by EPA Region 3. Nonpoint sources of pollutants contribute very little to water impairment. For transparency of information, the District of Columbia discloses an average amount of information. For strength of program, the Bay TMDL allocations should be written into the NPDES permits for the District's point sources.

The District's draft WIP would lower nitrogen and phosphorus discharges to a level that is 5 percent below the respective target allocations. However, the draft WIP still permits sediment discharges to be 26 percent more than allowed by the target allocation.[10]

In the final Phase I WIP, the District should discuss in greater detail its pending stormwater permit, including the programs and elements that will reduce stormwater runoff and nutrient and sediment discharge.

NPDES Permitting

The draft WIP indicates that all facilities that require NPDES permits have them or are in the process of renewal.[11] EPA Region 3 is the permitting authority for the District. DC Water, a semiautonomous regional entity, holds a combined permit for the Blue Plains Wastewater Treatment Facility and the District's combined sewer system. Upgrades to these systems are specified as permit conditions or as a result of consent decrees, and the draft WIP lays out a timeline for upgrades and the resulting pollutant reductions. If implemented as planned, the District's nitrogen and phosphorous targets will be met.

Enforcement of NPDES Permits

The draft WIP indicates that both major and minor facilities are inspected on an annual basis. EPA Region 3 has enforcement authority to ensure compliance with the permit conditions. However, the draft WIP does not disclose specific information related to enforcement and compliance efforts. In the final WIP, the District should disclose this information to substantiate its claims and should also explain its procedures for ensuring compliance.

Monitoring and Verifying Voluntary Practices by Nonpoint Sources

This section does not apply to the District of Columbia, which will meet its Bay TMDL allocations through point sources.

Contingencies

Again, this section does not apply to the District because most of the pollutant sources are point sources that are subject to NPDES permits and mandatory consent decrees and other federal regulations with specific deadlines for compliance.

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[10] U.S. E.P.A., "Summary: EPA Evaluation of District of Columbia Draft Watershed Implementation Plan" (Sept. 22, 2010) (on file with Yee Huang).

[11] The draft WIP notes that the "District is not aware of additional sources that require (but lack) NPDES permits."

Concentrated Animal Feeding Operations

This section does not apply because the District does not have any CAFOs.

Stormwater

The District's 2004 MS4 permit expired in August 2009 but has been administratively extended, pending finalizing of the 2010 MS4 permit. The 2004 permit is missing numeric effluent limitations and has been subject to litigation, resulting in upgrades to the District's stormwater management plan and upgrades in the 2010 permit. The WIP specifically refrains from discussing the draft 2010 permit because it has not been issued. Because the District is relying solely on this permit to achieve its reductions for the stormwater section, the final WIP should discuss the permit in greater detail, addressing the legal tools, staffing resources, and financial resources needed to require the use of low-impact development and green infrastructure practices and estimates of pollutant reductions from using these practices.

Air Deposition

The District does not attribute any of its nitrogen loading to air deposition. Thus the draft WIP does not include this discussion.

Maryland

Overall

Maryland's draft Phase I Watershed Implementation Plan (WIP) is an inventory of the state's pollutant control programs with no substantive commitment to implementing or bolstering specific programs. For transparency of information, Maryland discloses an average amount of information, whch is somewhat surprising because much of the vital information already exists as part of its annual enforcement and compliance report. For the strength of its programs, Maryland lists a menu of pollutant control options that will enable the state to meet 130 percent of its TMDL load allocation but does not commit to any of those options. The options are not accompanied by funding commitments or deadlines for implementation.

The WIP was "expressly written to solicit public comments on a wide range of pollution control strategy options.... [T]he options chosen to implement the needed reductions will be selected with the benefit of the public comments..." Public comment and input is undoubtedly valuable, but ultimately Maryland must make the tough decisions that protect the environment and lead to a restored Bay for present and future generations. By leaving the particulars open to debate, Maryland is likely to receive less focused and less helpful comments.

The draft WIP meets the nitrogen and phosphorus allocations and reduces the sediment pollution to a level that is 26 percent below the target allocation.[12] Maryland's final Phase I WIP should include the permitting and enforcement information already contained in its annual compliance and enforcement report to establish its baseline capacity. The final Phase I WIP should also contain contingencies for slow or delayed implementation of primary pollutant controls.

NPDES Permitting

In the draft WIP, Maryland included some information about its permitting program, such as 526 Notices-of-Intent for facilities that are seeking coverage under the CAFO program, but failed to disclose information about existing facilities without permits, if any, or existing facilities with expired or administratively continued permits. Much of this information already exists in Maryland's FY 2009 Compliance and Enforcement Report, so MDE should collect this information and present it in the final WIP. Maryland also failed to establish deadlines, timelines, or qualitative goals for updating and reissuing expired and administratively continued NPDES permits.

Enforcement of NPDES Permits

Under section 1-301(d) of the Maryland Environment Code, MDE is required to publish a remarkable amount of information in its annual compliance and enforcement report.[13] Earlier this year CPR published a report on MDE's NPDES program and recommended that the agency make public enforcement and compliance actions by local governments with delegated authority. MDE provides a helpful table, not included in its annual report, that breaks down inspection and enforcement data at the county, municipal, and state levels for the sediment and erosion control program. Appendix H of the WIP shows a wide range of permits-to-inspector ratios and more than 360 inspections per inspector.

Maryland's draft WIP does not provide any internal assessment of the effectiveness of its program, nor does it provide sufficient information to judge the strength of its enforcement program.

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[12] U.S. E.P.A., "Summary: EPA Evaluation of Maryland Draft Watershed Implementation Plan" (Sept. 22, 2010) (on file with Yee Huang).

[13] Md. Environ. Code § 1-301(d).

Earlier this year, CPR conducted an evaluation of enforcement trends and found that MDE is significantly underfunded and its enforcement program is not designed to ensure compliance with NPDES permits and does not take advantage of citizen suits as additional enforcement assistance.[14] For example, between 2000 and 2009, the overall workforce budget for the Water Management Administration declined nearly 25 percent, when adjusted for inflation, and coincided with a doubling of permits-in-effect. The average penalty obtained per enforcement action was striking low, roughly $1,260.

Maryland's final WIP should explain how it intends to improve its enforcement program and address these issues as they relate to the Bay.

Monitoring and Verifying Voluntary Practices by Nonpoint Sources

The draft WIP lists the different verification schedules for different federal and state funds. For example, inspectors conduct random spot checks of 10 percent of best management practices funded by the MACS program. The final WIP should include information regarding participation and effectiveness of these nonpoint source pollutant control activities. In addition, the draft WIP does not cite dedicated funding for monitoring and verification. This information should be included in the final Phase I WIP.

Contingencies

Overall the draft WIP fails to discuss what contingencies Maryland will implement for slow or incomplete implementation. EPA's Expectations letter specified that the WIPs should contain specific plans to implement contingencies in the event of delayed adoption of new or revised legislation or regulations, inadequate compliance or participation rates, or adverse changes in land use or development rates.[15]

In the final WIP, Maryland should ensure that its contingencies are clearly identified and are coordinated with specific failures, have timely implementation deadlines, are effective, and have legal authority to require implementation.

Concentrated Animal Feeding Operations

Maryland should be commended for having a CAFO NPDES program that is up-to-date with federal regulations, but it must now focus on issuing permits to all the facilities that qualify as CAFOs and work towards ensuring compliance with the permit terms. By not disclosing the total number of CAFO facilities, how many of those have permits and how many still need permits, and when all the facilities that require permits will have them, Maryland's draft WIP undermines the assurance that the NPDES program provides. In the final WIP, Maryland should provide a timeline or schedule for issuing CAFO NPDES permits.

The draft WIP also fails to disclose gaps related to funding and personnel needed to establish and maintain an effective CAFO NPDES permitting program. CAFO permits issued after the Bay TMDL is finalized must be consistent with the wasteload allocations in the TMDL.

Stormwater

The draft WIP includes a final copy of the Montgomery County final permit, which provides a useful insight into the county's delegated enforcement authority. For example, the county "shall conduct

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[14] *See* attached, Center for Progressive Reform, *Failing the Bay: CWA Enforcement In Maryland Falling Short* (April 2010), *available at* http://www.progressivereform.org/articles/mde_report_1004FINALApril.pdf.

[15] Expectations Letter, *supra* note 1.

preventative maintenance of all stormwater management facilities at least on a triennial basis" and make annual reports of enforcement and compliance activities.[16] If in fact local authorities have an inspection rate of 30 percent, this rate would exceed the rate recommended by EPA.

As with other sectors, however, the draft WIP does not disclose the estimated funding and personnel gap, if any, and does not explain how this gap will be filled to ensure that the state has and maintains an effective stormwater program.

Air Deposition

The draft WIP provides useful information regarding the air deposition of nitrogen by major river basin and lists the relevant state air programs that can be used to reduce pollutant loadings. As with other sectors, however, the draft WIP fails to explicitly state how these programs will be bolstered in order to achieve adequate load reductions. The draft WIP gives no indication of whether MDE currently has adequate funding and personnel to run an effective air pollution prevention program and thus does not provide assurance that reductions from air deposition will occur.

[16] Maryland's Phase I Watershed Implementation Plan for the Chesapeake Bay Total Maximum Daily Load, Appendix D (Sept. 1, 2010).

New York

Overall

New York has adopted a hostile posture toward TMDL process, noting that the "submission of this draft Phase I WIP should not be interpreted as New York's acceptance of these draft allocations…. New York has repeatedly expressed serious concerns over the fundamental fairness of these allocations…." For transparency of information, New York discloses a fair amount of specific data to establish a baseline for comparing future progress. For strength of program, the pollution control programs and authorities that are listed in New York's WIP sound promising, and the WIP boasts of being stronger than federal requirements. However, the draft WIP does not provide enough information to determine whether the strength on paper actually translates into strength in substance.

In addition, New York is highly critical of the model and the fairness of allocations. It points out that while the state constitutes 10 percent of the land area in the watershed, it receives less than 5 percent of the total nitrogen. In contrast, Maryland constitutes approximately 14 percent of the total Bay watershed but has received more than 20 percent of the nitrogen allocation. However, while not proportional to the land area, the allocations are roughly proportional to each state's *actual* contribution of nitrogen: New York contributes 6 percent and Maryland contributes 20 percent of the total nitrogen to the Bay.

The draft WIP would lower the sediment discharges to a level that is 16 percent below the target allocation. However, the draft WIP still permits nitrogen and phosphorus discharges to be 15 percent and 14 percent, respectively, more than the level allowed by the target allocation.[17]

New York's final Phase I WIP should provide greater detail about the NPDES permitting, enforcement, and compliance program, particularly if the state intends to rely on increased enforcement as its main contingency plan if existing compliance rates and programs fail to achieve the needed reductions. The final WIP should also provide more information about the participation and compliance rates with voluntary programs for nonpoint sources of pollution.

NPDES Permitting

In the draft WIP, New York provides solid baseline information, such as statistics on the number of CAFOs and wastewater facilities, but fails to provide a snapshot of the universe of all NPDES-regulated facilities and the number of which have up-to-date NPDES permits. The draft WIP does not say when the New York's NPDES permitting program will be in compliance with the pollutant allocations in the Bay TMDL. Moreover, New York failed to establish deadlines, timelines, or qualitative goals for updating and reissuing expired and administratively continued NPDES permits. For example, the state could commit to reissuing and updating a certain number of permits per month for a certain program and could include this target as one of its two-year milestones.

Enforcement of NPDES Permits

The draft WIP includes some information by which to judge the enforcement of NPDES permits. For example, it cites an inspection rate of 50 percent for CAFOs and a total penalty collection of $11 million for CAFO penalties, as well as 2000 staff trained for construction site inspections.[18] However,

[17] U.S. E.P.A., "Summary: EPA Evaluation of New York Draft Watershed Implementation Plan" (Sept. 22, 2010) (on file with Yee Huang).

[18] New York State Department of Environmental Conservation, Chesapeake Bay Nitrogen, Phosphorus and Sediment Total Maximum Daily Loads: New York Draft Phase I Watershed Implementation Plan 17 & 22 (Sept. 1, 2010), available at http://www.epa.gov/reg3wapd/pdf/pdf_chesbay/NYDraftPHIWIP.pdf.

this information is incomplete. In the final WIP, New York should include a table or other graphic that clearly lays out its enforcement activities per sector. This information should include: the number of physical, on-site inspections conducted per sector; the number of violations and penalty actions or the total amount of penalties assessed; information on major facilities that are in significant non-compliance; and the level of enforcement resources.

Monitoring and Verifying Voluntary Practices by Nonpoint Sources

The New York WIP does not discuss inspection rates or existing or needed resources to regularly monitor implementation of best management practices. In the final WIP, New York should include this information because it is crucial to providing the necessary reasonable assurances that nonpoint sources will achieve their allocation of pollutant reductions.

Contingencies

New York is relying heavily on increased enforcement and compliance activities as its contingencies. It already has the authority to conduct these activities as primary pollutant control activities. If greater enforcement is the primary contingency, however, New York should provide more detailed enforcement information to demonstrate how this contingency will be effective.

Concentrated Animal Feeding Operations

The strength of New York's CAFO program is that, together with the Agriculture Environmental Management program, 95 percent of dairies in the Bay watershed are covered, significantly more than the federal CAFO Program alone. For example, the state program covers all farms with as few as 200 cows, while the federal program only covers some farms with more than 700 cows.[19] In addition, New York's CAFO program is in the process of being updated to be consistent with the new federal regulations but does not state when it will be complete. The final WIP should provide the final date for the completion of CAFO program updates and should indicate what if any changes will be made and how those changes will contribute to decreases in pollutant discharges. It should also detail how and with what funds additional staff will be hired. New York should also provide a timeline or set of goals for updating, renewing, or reissuing existing permits that contain both the Bay TMDL allocations and the federal regulations.

Stormwater

The stormwater section lists guidance for stormwater inspections and for local delegated authorities but fails to provide specific information about how the guidance, laws, and regulations will be applied to achieve reductions in pollutants from stormwater. The section refers to the state manuals but does not explain the applicable standards or otherwise demonstrate how stormwater management will be improved.

In the final WIP, New York should take the next step beyond simply listing its authorities and include specific details about how it intends to apply these authorities.

Air Deposition

The draft WIP includes a discussion of state authorities to address air deposition of nitrogen, including the adoption of year-round NOx limits from power plants and other stationary sources and California's low-emission-vehicle standards. The WIP does not indicate whether these authorities are

[19] New York's Draft Phase I WIP at 13.

sufficient to achieve the necessary pollutant reductions. The final WIP should include a more detailed analysis of the gaps in New York's air program, including what additional legislative authorities may be needed to achieve greater reductions from air sources and what funding or personnel resources are needed for this sector and how these gaps may be filled.

Pennsylvania

Overall

The Pennsylvania draft WIP is characteristic of nearly all the states' submissions. It includes a detailed recitation of the state's programs to control pollutants, but fails to provide specific numbers on the effectiveness and scope of these programs. The transparency of information is uneven across the major sectors, and the strength of its programs is average. The draft WIP does not explain how each requirement or incentive strategy will result in the reduction of a specific amount of pollutants so that the states will meet their allocations under the Bay TMDL. Without such specific details, or an explanation of what additional programs the state intends to implement, the WIP is no more meaningful to the EPA or the public than a visit to the state's website. Because Pennsylvania did not provide such essential details, it is difficult to determine the effectiveness of existing programs. EPA itself considers the WIP to be "very weak compared to the amount of N, P, and sediment [that Pennsylvania] must reduce."[20]

The draft WIP would lower the sediment discharges to a level that meets the target allocation. However, the draft WIP still permits the nitrogen and phosphorus discharges to be 4 and 16 percent, respectively, more than the level allowed by the target allocations. In its final Phase I WIP, Pennsylvania must explain precisely how it intends to meet these reduction targets by strengthening its permitting and enforcement programs and making additional commitments to monitor and verify voluntary pollution management practices.

NPDES Permitting

Pennsylvania includes some baseline information, including the number of CAFOs and stormwater dischargers that have NPDES permits, but overall the draft WIP fails to provide a snapshot of the universe of all NPDES-regulated facilities and the number of which have up-to-date NPDES permits. The draft WIP does not say when the state's NPDES permitting program will be in compliance with the pollutant allocations in the Bay TMDL.

Similarly, Pennsylvania failed to establish deadlines, timelines, or qualitative goals for updating and reissuing expired and administratively continued NPDES permits. For example, the state could commit to reissuing and updating a certain number of permits per month for a certain program and could include this target as one of its two-year milestones. Bay states should identify institutional milestones, such as goals for hiring more permit program staff by a certain time or establishing and maintaining a database of NPDES permit holders, to ensure that the existing NPDES permitting program better regulates and monitors pollutant discharges.

Enforcement of NPDES Permits

The draft WIP provides general information on how enforcement for stormwater is prioritized. According to the WIP, in 2008 DEP and conservation districts conducted over 10,000 compliance inspections in the stormwater program, but it is unclear whether these inspections were physical, on-site inspections or simply reviews of self-submitted paperwork. They investigated 1,439 citizen complaints and collected $135,000 in penalties, a token amount.[21] The WIP also notes an increased focus on agriculture and stormwater compliance, but the efforts sound mostly cooperative and voluntary rather than deterrent in nature.

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[20] U.S. EPA, "Summary: EPA Evaluation of Pennsylvania Draft Watershed Implementation Plan" (Sept. 24, 2010) (on file with Yee Huang).

[21] The WIP does not state the number of penalties sought or provide an estimate of how much was sought for each penalty.

In the final WIP, Pennsylvania should provide the following information for all of the NPDES sectors: number of inspections; number of facilities in significant noncompliance and the reasons why; and number and types of enforcement actions taken and penalties assessed. The WIP should also discuss local governments' enforcement authorities and activities, enforcement resources, and major facilities in significant noncompliance.

Monitoring and Verifying Voluntary Practices by Nonpoint Sources

The Pennsylvania WIP briefly explains that it has a targeted watershed approach to monitor and ensure proper implementation of agriculture BMPs, but fails to provide adequate detail about how these watersheds are identified and more importantly *how* Pennsylvania will ensure proper implementation.

The draft WIP does provide, for some voluntary programs such as the Growing Greener Watershed Protection Grant Program and the Pennsylvania Agricultural Conservation Easement Purchase Program, the past funding levels and current budgets. For example, the Growing Greener Program gave $12.6 million statewide for the grant period ending in April 2010 and will give $6 million for the current grant period. However, the draft WIP does not allocate a specific portion to monitoring and verification activities. In the final WIP, Pennsylvania should conduct a more thorough gap analysis to better identify how existing programs can be used to maximize pollutant reductions, what new programs may be needed, and what staffing and funding are necessary to ensure successful reductions from nonpoint sources.

Contingencies

Pennsylvania's draft WIP speaks only in generalities about what contingencies would be implemented if primary pollutant controls fail to produce the necessary reductions. In the final WIP, Pennsylvania should ensure that its contingencies are clearly identified. They must be coordinated with specific failures, have timely implementation deadlines, and be effective. The WIP must identify what, if any, additional legal authority is needed to implement these contingencies and ensure that the enactment of these authorities is not an excuse for delay.

Concentrated Animal Feeding Operations

According to the draft WIP, Pennsylvania has 317 permitted CAFOs within its portion of the Bay watershed but does not provide an estimate of the universe of CAFOs that require but do not have permits.[22] A recent estimate by EPA indicates that Pennsylvania has roughly 480 CAFOs in the entire state, 334 of which have permits and 146 of which do not.[23] Pennsylvania's CAFO permitting program is in the review process and changes, if any, will be made after its current General Permit expires on September 30, 2011. The WIP does not include any discussion of the specific regulatory revisions that may be needed to comply with the new federal regulations. The WIP is honest in stating that the DEP staff for the CAFO program are "insufficient to ensure compliance" and that "there is no expectation that additional state funds for staff resources will become available in the near term."[24] At present, the WIP indicates that the CAFO program has startlingly few staff resources: 1.2 staff positions at the Department of the Environment's central office and another 6 staff positions in regional offices for inspection,

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[22] Pennsylvania Department of Environmental Protection, *Pennsylvania Chesapeake Watershed Implementation Plan* 63 (Sept. 2010), *available at* http://files.dep.state.pa.us/Water/Chesapeake%20Bay%20Program/ChesapeakePortalFiles/9-2-2010/PA%20DRAFT%20WIP%209-1-%202010.pdf (hereinafter "PA WIP").

[23] U.S. E.P.A., "NPDES CAFO Rule Implementation Status—National Summary, First Quarter 2010" (Mar. 31, 2010), *available at* http://www.epa.gov/npdes/pubs/tracksum1Q10.pdf. Of the 480 estimated CAFOs, 334 have permits according to EPA data.

[24] PA WIP, *supra* note 22, at 64.

compliance, and permitting activities.[25] This low number, 7.6 total staff positions for 480 CAFOs across the state, does not inspire confidence that Pennsylvania's program is or can be effective.

Pennsylvania's final WIP should disclose what regulatory changes are likely to occur as a result of updating the CAFO regulations, including whether or not the CAFO regulations should be expanded to include more AFOs. It should also specify the details of CAFO inspection, setting a physical, onsite inspection rate of at least 20 percent annually.

Stormwater

Pennsylvania's stormwater section is primarily an inventory of existing laws and regulations with no additional description of how these tools will be used to achieve pollutant reductions. EPA notes that the existing programs have "questionable enforceability and accountability." The WIP also does not disclose the extent of authority delegated to local governments that administer the stormwater program.

The WIP does well in recognizing that the permit fees are insufficient to implement the stormwater program but does not propose a timeline for seeking an increase in those fees. In the final WIP, Pennsylvania should explicitly state how it will improve its stormwater program to achieve the allocations in the Bay TMDL.

Air Deposition

Pennsylvania plans to rely on reductions from implementation and enforcement of Clean Air Act requirements, specifically by reducing pollution from sources such as kilns and glass manufacturers, and switching to renewable energy sources. Pennsylvania's final WIP should further detail its state air pollution programs that can be used to reduce air deposition of nitrogen and specific actions that demonstrate how the state will use these other authorities, as it did with the kilns and glass manufacturers. Pennsylvania should also ensure that it has the staff and financial resources to conduct an effective air program, and, if not, propose how it will obtain these resources.

[25] *Id.* at 65

Virginia

Overall

Overall Virginia expresses great resistance, if not outright hostility, to the Bay TMDL. Throughout the development of the Bay TMDL, Governor McDonnell has repeated his concerns about the cost, legality, allocations, and timeline for action. This attitude is reflected in the draft WIP. The WIP relies heavily on an expanded nutrient trading program to achieve its pollutant reductions under the Bay TMDL, but the plan fails to specify what laws, regulations, funding, and other resources are needed to ensure that the trading program is functional and effective and results in actual pollutant reductions rather than simply paper trades.

The draft WIP would lower sediment pollution to a level that is 12 percent below the target allocation. However, it still permits nitrogen and phosphorous allocations discharges to be 6 percent and 7 percent, respectively, more than the level allowed by the target allocation.

For transparency of information, the draft WIP does not disclose much of the crucial information. For strength of its programs, relying on an expanded trading program fails to inspire confidence that pollutant allocations will in fact be met. In its final WIP, Virginia should provide more details regarding how its nitrogen and phosphorus allocations will be met by all sectors through the trading program. Water quality trading raises serious concerns about creating hotspots of pollutants and establishing accountability to ensure that trades result in *actual* pollutant discharge reductions rather than paper trades. The Virginia Department of Environmental Quality should provide legislative guidance to enable the Virginia General Assembly to expand the state trading program, including appropriate geographic and temporal limitations and the establishment of baselines for the trading program. Virginia should also detail back-up pollutant control measures that will also achieve the Bay TMDL in case the nutrient trading program is not expanded to include all sources of nitrogen, phosphorus, and sediment.

NPDES Permitting

In the draft WIP, Virginia includes some information regarding the number of wastewater facilities and stormwater dischargers but fails to provide a snapshot of the universe of all NPDES-regulated facilities and the number of which have up-to-date NPDES permits. Virginia also failed to establish deadlines, timelines, or qualitative goals for updating and reissuing expired and administratively continued NPDES permits. The draft WIP does not address gaps, if any, in personnel levels and how the gaps might be filled.

Enforcement of NPDES Permits

Virginia's draft WIP does not provide any internal assessment of the effectiveness of its program, nor does it provide sufficient information to judge the strength of its enforcement program. The final WIP should include: the number of physical, on-site inspections conducted per sector; the number of violations and penalty actions or the total amount of penalties assessed; information on major facilities that are in significant non-compliance; and the level of enforcement resources.

Monitoring and Verifying Voluntary Practices by Nonpoint Sources

The Virginia WIP does not discuss inspection rates or the existing or needed resources to regularly monitor implementation of best management practices. This information is crucial to providing the necessary reasonable assurances that nonpoint sources will achieve their allocation of pollutant reductions. Moreover, Virginia intends to include nonpoint sources in an expanded trading program,

which highlights the importance monitoring and verifying implementation of voluntary practices in order to accurately get credit for those practices. In the final WIP, Virginia must include this information.

Contingencies

The draft WIP speaks only in generalities about what contingencies would be implemented if primary pollutant controls fail to produce the necessary reductions. For Virginia, a thorough discussion of contingencies is particularly important because the state plans to expand its nutrient trading program for pollutant reductions. If the nutrient trading does not work or causes significant delays, Virginia will need to implement its contingencies.

In the final WIP, Virginia should ensure that its contingencies are clearly identified. They must be coordinated with specific failures, have timely implementation deadlines, be effective, and legal authority must exist for their implementation.

Concentrated Animal Feeding Operations

According to the draft WIP, Virginia's new CAFO regulations became effective on March 3, 2010, and the Virginia Department of Environmental Quality is "in the process" of modifying the CAFO permit program. The final WIP should provide a final or at least estimated date of when all CAFO permits will be in compliance with both the new regulations and the Bay TMDL. The draft WIP also fails to disclose gaps related to funding and personnel needed to establish and maintain an effective CAFO NPDES permitting program.

Stormwater

Virginia's stormwater section fails to include much of the basic information needed to evaluate its stormwater programs. The section does not include permitting information or the scope of authority and enforcement activities conducted by local governments with delegated authority. The section fails to disclose information about available and needed resources and how the state will obtain these resources.

Air Deposition

Virginia's draft WIP generally does not include a discussion of controlling sources of air deposition of nitrogen in the state, with the exception of the James River Basin. There, the draft WIP simply acknowledges the need to reduce atmospheric deposition of nitrogen without specifying how it will be achieved. The final WIP should include a list of Virginia's state air authorities and specific details on how these authorities will be applied to achieve the nitrogen allocations. These details must include the level of enforcement, personnel, and financial resources dedicated to the state's air program, the gaps in these resources, and how and when the gaps may be filled.

West Virginia

Overall

For transparency of information, West Virginia disclosed a significant amount of specific information related to its current programs and capacities but, similar to the other draft WIPs, failed to commit to specific actions to achieve pollutant allocations under the Bay TMDL. This lack of specific actions makes it difficult to have confidence that the state will achieve its pollution reduction requirements. For the strength of its programs, West Virginia appears to rely on mostly voluntary programs to reduce pollutant discharges from its nonpoint sources but does not provide any information to assess the effectiveness of and compliance with these programs.

The draft WIP would lower phosphorus discharges to a level that is 6 percent below the target allocation. However, the draft WIP still permits nitrogen and sediment allocations to be 18 percent and 38 percent, respectively, more than the level allowed by the target allocation.[26]

In its final WIP, West Virginia must commit to taking specific actions that will ensure achievement of the Bay TMDL and provide more compliance and participation information to ensure that nonpoint sources contribute to the nitrogen, phosphorous, and sediment reductions.

NPDES Permitting

West Virginia disclosed a good deal of information regarding the number of facilities with permits but failed to disclose other permitting information, such as the universe of facilities that require but do not yet have permits and the number of expired or administratively continued permits and when they will be updated. The draft WIP notes a personnel gap in all sectors but does not specify the gap or how or when that gap will be filled.

In the final WIP, West Virginia should include a more thorough capacity and gap analysis and establish goals for ensuring all facilities have the required and up-to-date permits that are consistent with the Bay TMDL.

Enforcement of NPDES Permits

The draft WIP does not contain much enforcement information, apart from noting that there are "regular" inspections of wastewater facilities and that the state is in the process of developing an enforcement protocol for stormwater discharges. Unlike other states, however, West Virginia does include data on the major facilities that are in significant non-compliance.

In the final WIP, West Virginia should include complete enforcement data, such as: the number of physical, onsite inspections per sector; the number of violations and penalty actions and the amount of penalties assessed during the past year; a description of the enforcement activities by local governments with delegated authority; and a clearer picture of enforcement resources. One avenue for this disclosure is for the West Virginia Legislature to pass legislation requiring an annual report of enforcement activities, such as section 1-301(d) of the Maryland Environment Code.[27]

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[26] U.S. E.P.A., "Summary: EPA Evaluation of West Virginia Draft Watershed Implementation Plan" (Sept. 22, 2010) (hereinafter EPA Summary Report) (on file with Yee Huang).

[27] *Supra* note 3 and accompanying text.

Monitoring and Verifying Voluntary Practices by Nonpoint Sources

The draft WIP relies on voluntary implementation of best management practices, which are funded by a combination of federal, state, and private monies. The draft WIP does not indicate how successful the voluntary implementation has been. In the final WIP, West Virginia should disclose the acreage currently under voluntary management or best practices and the method of ensuring compliance with funding terms. As a contingency, the state should consider transitioning some voluntary practices into mandatory practices.

Contingencies

The draft WIP does not discuss contingencies related to each sector, and the contingencies that are discussed lack evidence of serious commitment to implement should the primary controls fail or be delayed. The contingency for stormwater, for example, states that the West Virginia legislature "could enact statewide stormwater regulations that address water quality and water volume outside of MS4 areas." While regulating more areas for stormwater would certainly contribute to pollutant reductions, the WIP gives no indication when these regulations be enacted or what areas might qualify for additional regulation.

In the final WIP, West Virginia should include contingencies that cover each sector and should specify when and how these contingencies will be implemented.

Concentrated Animal Feeding Operations

The draft WIP notes that in 2010 West Virginia revised its CAFO regulations to match federal rules. According to EPA, however, the CAFO program has not yet been approved and "there are several issues that need to be addressed in order for EPA to approve."[28] The draft WIP also admits that the universe of facilities that require CAFO permits cannot currently be determined, and that despite the cumulative impact of discharges from AFOs West Virginia does not intend to have universal CAFO designation.

The final WIP should provide an estimate for the date of EPA approval and the subsequent timeline for ensuring that all facilities receive permits that are consistent with the Bay TMDL. West Virginia should also provide more information regarding its CAFO compliance and enforcement program, including inspection frequency, compliance rates, enforcement activities and penalties, and any other relevant information.

Stormwater

The draft WIP includes, notably, specific future goals for active registrations under the permit (decreasing acreage under the construction stormwater general permit to 2025) and a brief discussion of how WV might achieve these goals. However, it does not include information about the authorities of local authorities to verify stormwater discharges and compliance with NPDES permits, nor does it include information regarding the personnel and funding gaps and how the state will fill them.

In the final WIP, West Virginia should address these gaps and overall provide a more detailed review of its stormwater program and how it will substantively be used to meet the stormwater allocations in the Bay TMDL.

[28] EPA Summary Report, *supra* note 26.

Air Deposition

The draft WIP does not include a discussion of authorities to reduce air deposition of nitrogen. In the final WIP, West Virginia should disclose a list of all major sources of pollutants that contribute to air deposition of nutrients in the Bay, a list of air pollution control authorities that the state plans to use to control air pollution, and an estimate of the funding and personnel gap and a plan with deadlines or commitments to fill that gap.

List of State Agency Heads

The following is a list of state agency heads to whom CPR sent a copy of *Ensuring Accountability in Chesapeake Bay Restoration: Metrics for the Phase I Watershed Implementation Plans*.

Delaware
Secretary Collin O'Mara, Delaware Department of Natural Resources and Environmental Control
Secretary Ed Kee, Delaware Department of Agriculture
Director Constance Holland, Delaware Office of State Planning Coordination
Attorney General Beau Biden

District of Columbia
Director Christophe A. G. Tulou, District Department of the Environment
Director Harriet Tregoning, District Office of Planning
Attorney General Peter Nickles

Maryland
Secretary John R. Griffin, Department of Natural Resources
Secretary Shari T. Wilson, Maryland Department of the Environment
Secretary Earl F. Hance, Maryland Department of Agriculture
Secretary Richard E. Hall, Maryland Department of Planning
Attorney General Doug F. Gansler

New York
Commissioner Pete Grannis, New York Department of Environmental Conservation
Commissioner Patrick Hooker, New York Department of Agriculture & Markets
Attorney General Andrew M. Cuomo

Pennsylvania
Secretary John Quigley, Pennsylvania Department of Conservation and Natural Resources
Secretary John Hanger, Pennsylvania Department of the Environment
Secretary Russell C. Redding, Pennsylvania Department of Agriculture
Attorney General Tom Corbett

Virginia
Secretary Doug Domenech, Department of Natural Resources
Director David K. Paylor, Virginia Department of Environmental Quality
Commissioner Matt Lohr, Virginia Department of Agriculture and Consumer Services
Director Daniel Timberlake, Virginia Department of Planning & Budget
Attorney General Kenneth Cuccinelli

West Virginia
Secretary Kelley M. Goes, West Virginia Division of Natural Resources
Secretary Randy C. Huffman, West Virginia Department of Environmental Protection
Commissioner Gus R. Douglass, West Virginia Department of Agriculture
Attorney General Darrell V. McGraw, Jr.